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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

In re Y.R., a Person Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY BUREAU OF
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ABELARDO R.,

Defendant and Appellant.

A111404

(Contra Costa County
Super. Ct. No. J03-01333)

Abelardo R., the presumed father of Y.R., appeals from the lower court's denial of his petition pursuant to section 388 of the Welfare and Institutions Code.¹ Abelardo contends that the trial court abused its discretion in denying his petition because he presented sufficient evidence that circumstances had changed and granting his section 388 petition would have been in Y.R.'s best interest. We affirm the lower court's ruling.

BACKGROUND

On July 28, 2003, the Contra Costa County Bureau of Children and Family Services (bureau) filed a juvenile dependency petition pursuant to section 300 for the protection of Y.R., who was two weeks old at the time. At the time of Y.R.'s birth, her

¹ All further unspecified code sections refer to the Welfare and Institutions Code.

mother had tested positive for methamphetamine. Y.R. was born prematurely and had numerous medical complications. In addition, she had Down's syndrome. The petition alleged that Abelardo was the father and that he failed to provide adequate care and supervision for the child.

At the detention hearing on July 29, 2003, the juvenile court detained Y.R. Both of her parents were allowed to visit, under monitored conditions.

On August 26, 2003, the bureau filed an amended petition to allege that Abelardo and Y.R.'s mother engaged in ongoing domestic violence, which presented a danger to Y.R. The petition also alleged that on January 7, 2003, a court had terminated the parental rights in a dependency proceeding involving Y.R.'s older sibling. The petition was again amended on October 9, 2003, to add allegations that Y.R.'s mother had failed to complete her court-ordered substance abuse program in the dependency proceeding involving Y.R.'s sibling.

On October 29, 2003, both parents submitted to the jurisdiction of the juvenile court pursuant to subdivisions (b) and (j) of section 300. The court found true allegations of substance abuse related to Y.R.'s mother. It also found true that the parents had a history of domestic violence and that reunification services and the parents' rights had been terminated in the case involving Y.R.'s sibling.

The bureau prepared a disposition report and it recommended that reunification services not be provided to either parent pursuant to section 361.5, subdivision (b)(10) and (11) due to the parents' failure to reunify with Y.R.'s sibling, and the subsequent termination of their parental rights. The bureau reported that during the dependency proceedings related to Y.R.'s sibling, both parents had been referred to services to assist them in the areas of substance abuse and domestic violence. However, during those dependency proceedings, Abelardo had been arrested twice for charges related to both substance abuse and domestic violence.

Abelardo provided documentation that he was attending a group for alcohol and substance abuse and that he was being tested for drugs. He also had started a domestic violence class, although he had in the recent past been involved in a domestic violence

incident with Y.R.'s mother. According to the report, Abelardo had an extensive criminal history dating back to 1996, which consisted primarily of charges for possession of drugs and domestic violence.

The bureau's report also indicated that Y.R. was a fragile infant with many medical problems. In addition to exposure to methamphetamines in utero, she had congestive and congenital heart failure, Down's syndrome, and three holes in her heart, one of which had closed. She also had a gastronomy tube for feeding. Y.R. had to be closely monitored for conditions related to heart failure, which included lip discoloration, lethargy, lack of appetite, and excessive sweating. Y.R. was being monitored closely by her pediatrician and a cardiologist and was placed with a foster parent who specialized in caring for medically fragile infants. Neither of Y.R.'s parents had any training to care for the child; nor had either parent requested training to care for Y.R.'s special needs.

The juvenile court held a contested disposition hearing on March 17, 2004. After hearing evidence and argument, the court granted Abelardo presumed father status. The court also heard evidence that Abelardo was attending a domestic violence program regularly, testing for drugs regularly with negative results, and going to alcohol and substance abuse meetings. The court granted Abelardo reunification services, and terminated services for Y.R.'s mother. The court stated: "It looks to me like a relative long shot that he can successfully get there, but I am willing to give him a shot at it."

In the bureau's report for the six-month review, it recommended to continue reunification services for Abelardo. It stated that Abelardo had attended about one-half of Y.R.'s medical appointments. Y.R. was being seen by a cardiologist, her regular pediatrician, and a gastrointestinal specialist. The social worker believed that Abelardo had only a minimal understanding of his daughter's conditions and her many special needs.

On April 14, 2004, at the six-month hearing, the juvenile court ordered six more months of reunification services for Abelardo. The court incorporated the bureau's recommendations and found reasonable services had been offered.

In the bureau's report for the 12-month hearing, the bureau originally recommended to terminate reunification services for Abelardo. Abelardo's visits had been limited, due to his work schedule and Y.R.'s strict schedule related to the taking of her medicine and food. Abelardo wanted Y.R. to be placed in his care and he stated that he planned to work full-time and rely on family and friends to care for Y.R. The bureau acknowledged that Abelardo had made progress by completing domestic violence treatment and testing negative for drugs and alcohol, but it observed that he had not yet demonstrated that he understood or could care for Y.R.'s fragile health and developmental issues. He had not demonstrated his ability to administer medications or to provide the necessary specialized feeding procedures. The bureau noted that Y.R.'s current caretaker had expressed interest in adopting her, and it believed that to be a better alternative for her care.

On November 15, 2004, the parties met in the court's chambers and agreed to continue reunification services for Abelardo to the 18-month date. The bureau received a letter from the gastroenterologist. She said that Y.R.'s father and his entire extended family came to the clinic to learn how to feed Y.R. She stated that she believed the family had the experience and desire to take good care of Y.R. She sent another letter indicating that Abelardo and his sister demonstrated "medication administration[.]" A letter from Y.R.'s cardiologist indicated that her heart problems were relatively mild and, having met Abelardo, she did not "feel there are any contraindications to her returning to his care."

At the 12-month hearing, counsel for Y.R. stated, in pertinent part: "I am willing to go along with [continuing services to Abelardo to the 18-month date], but father has got to come up with some very specific plans for care of this child as well as demonstrate that he and any caretakers have some very specific knowledge about how to handle the day-to-day problems this child has. That isn't simply a matter of being able to demonstrate the procedures. It's also being able to demonstrate that when things potentially go wrong and problems crop up as they often do with a child with this many problems, that they're able to deal with it effectively because, frankly, there's a lot of

things besides the strict procedures that need to be followed because this is a difficult child to take care of”

The court further admonished Abelardo: “Lastly, Father, you need to understand something. The issue relates to the medical condition of the child. You could do your plan perfectly and still not get your child back. The reason is is that it would depend on what the doctors say about whether it’s medically safe to return the child to your care.” The court continued: “Part of this is going to depend on you. You need to be trained by the doctors, and I’m going to insist on a report from the doctors on this issue. If you aren’t trained, you don’t get your child back. . . .”

In the bureau’s report prepared for the 18-month review, it recommended that the matter be continued for six weeks to permit Abelardo to have overnight visits with Y.R. The bureau reported that Y.R.’s cardiologist did not feel there were any contraindications to Y.R.’s returning to Abelardo’s care. Additionally, Abelardo, his grandmother, and his girlfriend had met with Y.R.’s gastroenterologist for necessary training regarding her feeding and medication administration. The gastroenterologist stated that she felt the family could safely care for Y.R. and recommended a two-day overnight.

Y.R.’s regular pediatrician wrote on December 14, 2004, that Y.R. had been receiving excellent care in her current foster care situation. She indicated that she had met Abelardo on a number of occasions, but had “limited experience with his knowledge base and comfort level with the type of care that Y.R. will continue to require.” She indicated that he would have to receive training and demonstrate competence in the following: in administering medications and taking any action if there is a problem in administering medication, in caring for the gastrostomy tube apparatus and demonstrate an ability to replace a tube that has fallen out or what to do if the tube is clogged, in assessing changes in behavior or symptoms of illness, in basic math skills to be able to calculate and measure medication doses as well as to mix formula correctly, in administering tube feeds, in communicating with different specialists and therapists, and in keeping up with paperwork for Y.R.’s insurance and other involved agencies.

The bureau's report also indicated that Abelardo was still testing negative for alcohol and other drugs. However, it pointed out that he had missed four tests in September, six tests in October, and three tests in November. The bureau recommended to permit him to test less frequently.

At the 18-month hearing on January 20, 2005, the juvenile court stated it had a "hard time understanding" the bureau's recommendation given all of the drug tests Abelardo had missed. Counsel for Y.R. stated that she "was actually not at all satisfied with the recommendation [by the bureau] in this case. This child has improved greatly, but still has considerable health problems and requires a very high level of care and consistent care, and father has not shown consistency in really any aspect of his personal life that would give me any confidence that these overnight visits would be a good idea. [¶] I'm concerned about the missed tests. [¶] I'm concerned about . . . comments by the [bureau] regarding his lack of concern about his sister's ability to take care of the child. . . ."

The court stated that it was setting the matter for a contested hearing. It noted that services could not be extended for six weeks beyond the 18 months, unless the bureau wished to extend them voluntarily. The court expressed concern about the 13 missed drug tests given Abelardo's significant criminal history related to drugs from 1996 through 2003. The court ordered Abelardo to continue his testing as before, and told the bureau that it did not have the authority to reduce that requirement.

By the time of the contested hearing, the bureau recommended that the court set the matter for a hearing pursuant to section 366.26. At the contested 18-month review hearing on March 10, 2005, the court noted that it had suspended reunification services for Abelardo as of February 7, 2005. The previous reporting about Abelardo's drug testing was inaccurate and it was determined that he had missed seven rather than 13 tests. The court set the section 366.26 hearing and stated there were no court ordered services for Abelardo.

Abelardo filed a petition pursuant to section 388, requesting an additional six months of reunification services. With regard to change of circumstances, he asserted

that he had visited Y.R. and was being permitted unsupervised visits, which he asserted had gone well. He claimed that Y.R.'s health had improved and she no longer needed constant attention and monitoring and that he was capable of meeting her medical needs and was willing to do so. He also maintained that he had secured an adequate home for Y.R. and had made arrangements for child care while he was working. He alleged that the modification was in Y.R.'s best interest because "this time would permit her to fully integrate into her family of origin."

The bureau responded to the petition with a one-page memorandum. It noted that Abelardo had made progress and personal changes that were impressive, but he had "not been able to establish a satisfactory child care plan" and the bureau continued "to have reservations regarding [his] understanding of the kind of care and supervision that [Y.R.] requires. [Abelardo's] home environment and daily schedule may not be conducive to the kind of parenting that [Y.R.] needs." It therefore recommended denying his section 388 petition for more services.

At the section 388 hearing on June 28, 2005, the court indicated that the materials regarding the section 388 petition were insufficient. The court denied the section 388 petition without prejudice and continued this matter to be heard with the section 366.26 hearing.

In the bureau's report for the section 366.36 hearing, it recommended that parental rights be terminated to permit Y.R. to be adopted by her long-time foster mother. The bureau expressed continued concern that Abelardo had not been able to establish a satisfactory child care plan and had not shown an understanding of the kind of care and supervision that Y.R. requires. The bureau noted that Y.R. was doing well considering her "fragile entrance into this world." Two holes in her heart had closed and she may not need surgery. However, Y.R. continued to be fed through a gastronomy tube, a pump, and a bottle. She had started consuming soft foods orally and was learning how to use a spoon. The bureau stated that Y.R. had been in the hospital for a rotavirus, and Abelardo insisted that he had visited her one time. However, there was no documentation of that

visit in the visitor's log at the hospital. The prospective adoptive mother was with Y.R. "day and night during her stay in the hospital"

The bureau stated that a perspective adoptive home, the foster mother, had been identified for Y.R. and the prospective parent had worked with the bureau to complete a home study. The prospective adoptive mother was willing to continue to allow Abelardo and the family access to the child.

On July 28, 2005, the court heard testimony for both the section 388 and the section 366.36 hearing. The court received into evidence letters from Y.R.'s doctors. The cardiologist and gastroenterologist believed that Abelardo could care for Y.R. Y.R.'s pediatrician stated that she lacked the knowledge to determine whether Abelardo could care for his daughter.

Balandra Fregoso, the social worker on the case, testified that she believed Abelardo was "clean and sober" and that he had adequate housing for Y.R. She also testified that Abelardo's unsupervised visits with Y.R. had gone well. She stated that Y.R. was in the hospital for one week in April for a rotavirus and that she was told that Abelardo did not visit Y.R., although he claimed to have visited on one occasion.

Fregoso testified that Y.R. still needed 24 hours of supervision a day. The only plan Abelardo had for caretaking consisted of his intention "to have himself, his girlfriend, and his grandmother help care for [Y.R.]" Fregoso stated that the bureau changed its recommendation regarding reunification for Abelardo because he failed to follow through appropriately with Y.R.'s medical problems when she was hospitalized. Also, the bureau was concerned because Y.R. had never spent a significant amount of time with Abelardo. Fregoso agreed that Abelardo had consistently expressed a willingness to learn but his follow-through "has not been there[.]" Further, the social worker testified that Abelardo told Y.R.'s pediatrician that he was not "well versed in the day-to-day details" of Y.R.'s care.

Abelardo testified that he believed he had a good understanding of how to administer Y.R.'s medications and to feed her properly. He stated that he had a sister with Down's syndrome and had fed her and took care of her on a number of occasions.

However, when asked about Y.R.'s recent stay in the hospital in April 2005 for a rotavirus, Abelardo first said that he thought she was hospitalized because her " 'pressure' went up too much." He then explained that he was not sure why she was hospitalized in April.

The court denied Abelardo's section 388 petition, finding that he had not met his burden of proving either changed circumstances or best interests. The court complimented Abelardo for turning his life around. However, at this point, the focus had shifted to the needs of the child for permanency and stability. The court found that Y.R.'s need for permanency outweighed Abelardo's request to return her to his care or for further services. The court terminated parental rights.

Abelardo filed a timely notice of appeal.²

DISCUSSION

Abelardo contends that the juvenile court abused its discretion in denying his section 388 petition, which requested the court to reinstate reunification services. He claims that the court's denial of his section 388 petition adversely impacted the section 366.26 hearing.

Section 388 provides that, if circumstances have changed such that it would be in the child's best interest for an order to be modified, the court should modify the order. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.) Section 388³ therefore functions as

² We construe the notice of appeal to be from both the order denying the section 388 petition and the order terminating Abelardo's parental rights.

³ Section 388, subdivision (a) reads: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction."

an “ ‘escape mechanism’ when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights.” (*Id.* at p. 528.) “[It] provides a means for the court to address a legitimate change of circumstances” to afford the parent one last opportunity to reinstate reunification services prior to final resolution of custody status. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

The parent requesting the change has the burden of establishing the change is justified by a preponderance of the evidence. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) “It is not enough for a parent to show just a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.) After the termination of reunification services, the parents’ interest in the care, custody, and companionship of the child is no longer paramount. Rather, “ ‘the focus shifts to the needs of the child for permanency and stability[.]’ ” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

We review the denial of a section 388 petition under the abuse of discretion standard. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) A court abuses its discretion when its determination is arbitrary, capricious, or patently absurd. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

Abelardo contends that he established evidence of change of circumstances. He asserts that Y.R.’s condition had changed substantially and she no longer needed intensive care. Both the cardiologist and gastroenterologist confirmed that she could be cared for by a responsible adult and both believed that Abelardo met those qualifications. Further, he asserts that even the social worker admitted that his three unsupervised visits with Y.R. had gone well. He claims that the bureau and Y.R.’s pediatrician could not evaluate his extended care of Y.R. because he was never provided with the opportunity to have his daughter for an extended time period. He claims that he did not need a specific day care plan, because Y.R. no longer needed specialized care. Further, Abelardo’s family had experience in caring for a child with Down’s syndrome.

Abelardo also declares that he did everything he could to prepare himself to care for his daughter, which included taking CPR. He asserts the court should not have penalized him for undertaking the proper training. (See *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 773, 790 (*David B.*).) He claims that he was never given the opportunity to parent his child and therefore his skills should not have been compared with a foster parent who had daily contact with Y.R. (See *ibid.*)

Abelardo also maintains that reinstating his reunification services was in Y.R.'s best interest. He asserts that the court ignored the complex relationships between Y.R. and her biological family. (See *In re Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 529-530.) Further, he points out that the letters from the doctors indicated that he was active in the care of Y.R. and was interested in learning how to care for her.

We disagree with Abelardo that he established a change of circumstances between the time the juvenile court terminated reunification services and the time of the section 388 hearing. The bureau and court acknowledged that he had made significant changes in his personal behavior and in his personal life. Although the cardiologist and gastrointestinal specialist believed Abelardo could care for Y.R., the court also considered the testimony of counsel for Y.R. and the social worker that he had not demonstrated an ability to care for Y.R. Further, the pediatrician, who had the most contact with Y.R. could not offer an opinion as to whether he could care for her, but had stated that to care for Y.R. he would have to establish that he had competence: (1) in administering medications and taking any action if there were a problem in administering medication, (2) in caring for the gastrostomy tube apparatus, (3) in assessing changes in behavior or symptoms of illness, (4) in basic math skills to be able to calculate and measure medication doses as well as to mix formula correctly, (5) in administering tube feeds, (6) in communicating with different specialists and therapists, and (7) in keeping up with paperwork for Y.R.'s insurance and other involved agencies. None of Abelardo's testimony nor any of the evidence he presented at the hearing established the foregoing factors.

Further, although Y.R. had become much healthier, her counsel stated that she still had considerable health problems and required a very high level of care and consistent care. The social worker testified that Y.R. still needed 24 hours of supervision a day. Counsel for the child expressed concern that Abelardo could not provide consistent care. This concern escalated when counsel for Y.R. learned that Abelardo had spent no or very little time at the hospital visiting Y.R. during the time she was ill in April 2005 and also when counsel learned that Abelardo had missed a number of drug tests. Counsel for Y.R. believed this conduct revealed that Abelardo still lacked any consistency in his personal life.

Abelardo had the burden of establishing that he could care for Y.R. His only plan for caretaking was that he planned “to have himself, his girlfriend, and his grandmother help care for [Y.R.]” The social worker agreed that Abelardo had consistently expressed a willingness to learn but his follow-through “ha[d] not been there[.]” Further, the social worker testified that Abelardo told Y.R.’s pediatrician that he was not “well versed in the day-to-day details” of Y.R.’s care.

Finally, we disagree with Abelardo that the court unfairly compared his knowledge and abilities to the foster mother and his reliance on *David B.*, *supra*, 123 Cal.App.4th 768 is misplaced. In *David B.*, the parent was challenging the termination of reunification services, not an appeal from the denial of a section 388 petition. Thus, in the present case, unlike the one in *David B.*, the burden was on Abelardo to show there was a sufficient change of circumstances to warrant return of Y.R. to his care and that the change was in her best interests. Moreover, in the present case, unlike the one in *David B.*, the court had to compare Abelardo’s care with the foster mother’s care, because it had to determine whether reinstating reunification services would be in Y.R.’s best interests. Here, not only was it undisputed that Y.R. was thriving under the care of the foster mother, but the evidence also established that Y.R. had bonded with her.

Further, in *David B.*, *supra*, 123 Cal.App.4th 768, the reviewing court reversed the order terminating services because the father had done everything the social services agency had asked of him and had even requested anger management services on his own.

(*Id.* at pp. 772, 774, 798.) Here, the bureau, counsel for Y.R., and the court repeatedly advised Abelardo that he had to *demonstrate* his ability to care for Y.R.’s special needs. Although Abelardo presented evidence that he had participated in training to learn how to use the feeding tube and to administer medication, he still did not have a detailed child care plan. Further, he never established that he would recognize symptoms of illness for Y.R. In fact, Y.R. had been hospitalized for one week in April 2005 when she had a rotavirus; Abelardo’s testimony indicated that he did not know why she had been hospitalized.

We agree with the lower court that Y.R.’s need for permanency outweighed Abelardo’s request to have her return to his care and for further services. Y.R. deserves the chance for a stable, permanent home. Based upon the Supreme Court’s authority in *In re Stephanie M.*, *supra*, 7 Cal.4th 295, we conclude the juvenile court did not abuse its discretion in denying Abelardo’s section 388 petition. Accordingly, the denial of this petition did not have any prejudicial impact on the section 366.26 hearing.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Haerle, Acting P.J.

Richman, J.